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No. 03-9877

In the Supreme Court of the United States

JON B. CUTTER, ET AL.,

Petitioners,

v.

REGINALD WILKINSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting Section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, which precludes states from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to" a state prison or similar facility, unless the imposition of that burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (*id.* § 2000cc-1(a)).

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to the preservation of the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has regularly been involved—as a party, as counsel, or as an *amicus curiae*—in church-state cases before this Court and other federal and state courts throughout the nation.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has sought to preserve religious freedom through its defense of both the Free Exercise and Establishment Clauses of the First Amendment. In furtherance of that goal, the ACLU has appeared before this Court in numerous religion cases, both as direct counsel and as *amicus curiae*.[1]

Amici served as active members of a broad coalition of religious, civil-rights, labor, and other organizations that advocated for the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5. Thus,

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

amici have a significant interest in having this Court reject respondents' facial challenge to the constitutionality of Section 3 of RLUIPA, 42 U.S.C. § 2000cc-1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3 of RLUIPA generally precludes states from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution [such as a prison or state mental hospital], even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a).[2] States may impose such burdens only if they demonstrate that the imposition of a specific burden is justified by a compelling governmental interest. *Id.* § 2000cc-1(a)(1)-(2). In essence, the statute requires states to accommodate the religious needs of prisoners and other institutionalized persons under circumstances in which such accommodation would not otherwise be legally mandated.[3]

As this Court has explained, the "play in the joints" (*Locke* v. *Davey*, 540 U.S. 712, 124 S. Ct. 1307, 1311 (2004)) between the Religion Clauses allows a limited sphere

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[2] Section 3 of RLUIPA applies only when the relevant program or institution receives federal assistance or affects interstate commerce. See 42 U.S.C. § 2000cc-1(b).

[3] RLUIPA protects the adherent of *any* religion (see 42 U.S.C. §§ 2000cc-3(a), 2000cc-5(7)(A))—which necessarily includes both mainstream and obscure religions, as well as any other deeply held belief system. See *Africa* v. *Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) ("In considering a first amendment claim arising from a non-traditional 'religious' belief or practice, the courts have looked to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'") (citing *Malnak* v. *Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (quotation marks and brackets omitted)); see also *Gillette* v. *United States*, 401 U.S. 437, 445-448 (1971).

of permissible governmental accommodation of religion not required by the Free Exercise Clause or barred by the Establishment Clause. *E.g.*, *ibid.*; *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989) ("the scope of accommodations permissible under the Establishment Clause is larger than the scope of accommodations mandated by the Free Exercise Clause"); see also *Yoder* v. *Wisconsin*, 406 U.S. 205, 221 (1972) (urging "preserving doctrinal flexibility" and "a sensible and realistic application" of the Religion Clauses). This Court has also recognized, however, that, "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334-335 (1987) (quotation marks omitted).

The portion of RLUIPA that requires state officials to lift unnecessary governmental burdens on the religious exercise of institutionalized persons safely navigates the space between the Scylla and Charybdis that are the First Amendment's Religion Clauses.[4] This is so for the following reasons:

First, RLUIPA simply removes government-imposed burdens on the ability of prisoners and other institutionalized persons to exercise their faiths. These burdens are not only imposed by the government, but are reinforced by the very nature of state penal and mental institutions—in which every aspect of a person's life is controlled by state officials. See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (plurality op.) (governmental action is not an impermissible

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[4] See *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) ("By broadly construing both [Religion] Clauses, the Court has * * * narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.").

establishment of religion if it simply "remov[es] a significant state-imposed deterrent to the free exercise of religion"); *Wallace* v. *Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring) (same). Indeed, the driving force behind RLUIPA was evidence that prisoners, detainees, and institutionalized mental-health patients faced substantial state-imposed burdens in practicing their religious faiths that non-institutionalized persons do not encounter. See Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000).

Second, RLUIPA does not authorize states to provide any form of financial aid or sponsorship to religious organizations. See, *e.g.*, *Yoder*, 406 U.S. at 234 n.22 ("sponsorship" and "financial support" of religion are core Establishment Clause prohibitions); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970) (same). Rather, states must bear only whatever expenses may be incurred in removing government-imposed burdens on religion. This factor helps "to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

Third, in requiring states to lift government-imposed burdens on religious exercise, RLUIPA does not authorize states to grant accommodations that would impose substantial burdens on important rights or interests of third parties. *Texas Monthly*, 489 U.S. at 15 (a permissible, but not required, accommodation of religion cannot "burden[] non-beneficiaries markedly"); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-710 (1985).

Fourth, the statute does not create incentives for prisoners and other institutionalized persons to become religious or to change their religious beliefs or practices. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 231-232 (1997). Nor does the statute favor any religion over another. See, *e.g.*, *Bd. of*

Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*, 512 U.S. 687, 706-707 (1994); *id.* at 714-715 (O'Connor, J., concurring).

Together, these considerations lead the *amici curiae*—organizations that are well known to be vigilant about potential infringements of the religious liberty and church-state separation guaranteed by the First Amendment—to conclude that Section 3 of RLUIPA is not facially unconstitutional. While the constitutionality of a government-provided religious accommodation necessarily depends on many factors (see *id.* at 720 (O'Connor, J., concurring) (the Establishment Clause "cannot easily be reduced to a single test")), each of the four principles just enumerated has been significant in this Court's evaluation of religious accommodations. Section 3 of RLUIPA comports with these principles and should therefore be upheld against facial attack.

ARGUMENT

SECTION 3 OF RLUIPA IS A FACIALLY CONSTITUTIONAL ACCOMMODATION OF RELIGION.

Given the unique context in which Section 3 of RLUIPA requires the accommodation of religious activity, and the carefully cabined requirements that it places on states, respondents' facial constitutional attack on the statute must fail.

A. Section 3 Of RLUIPA Mandates Nothing More Than The Removal Of Substantial Government-Imposed Burdens On Religious Exercise.

Section 3 of RLUIPA does not allow states to employ their metaphorical thumbs to bias individuals' religious choices; it merely requires states to *remove* those fingers from the scale—thus allowing prisoners and other institutionalized persons to practice their religions more readily. Rather than authorizing or permitting states to encourage re-

ligious exercise, RLUIPA simply requires them not to *discourage* it.

1. In order to be an "accommodation" of religion, the governmental action in question must lift an identifiable government-imposed burden on free-exercise rights. See, *e.g.*, *Kiryas Joel*, 512 U.S. at 705 (government need not "be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *County of Allegheny*, 492 U.S. at 601 n.51 ("[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"); *Texas Monthly*, 489 U.S. at 15 (plurality op.) (accommodation must "remov[e] a significant state-imposed deterrent to the free exercise of religion"); *Wallace*, 472 U.S. at 84 (O'Connor, J., concurring) (an accommodation must lift a "state-imposed burden on the exercise of religion").

The line between a program that appropriately lifts a government-imposed burden on religious exercise and one that inappropriately provides governmental encouragement of religion requires careful policing. But as a general matter, instances in which the government simply lifts a burden of its own creation are much less likely to "advanc[e] religion" (*Amos*, 483 U.S. at 348 (O'Connor, J., concurring)), and therefore generally raise fewer red flags than other forms of governmental action that touch on religious exercise. Thus, an objective observer should perceive most actions that merely remove government-imposed burdens on religious exercise "as an *accommodation* of the exercise of religion rather than as a Government *endorsement* of religion." *Id.* at 349 (O'Connor, J., concurring) (emphasis added); see also, *e.g.*, *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

2. There can be no serious doubt that the rules governing conduct in prisons and similar state institutions can pose substantial obstacles to the ability of prisoners and other institutionalized persons to practice their religion. The very es-

sence of imprisonment is governmental restriction on personal liberty. See *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("[f]reedom from imprisonment—from government custody, detention, or other forms of physical constraints—lies at the heart of * * * liberty"). Almost every aspect of a prisoner's life is subject to round-the-clock control by the government. As one court ably explained, prison is a "complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings * * * from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others." *Morales* v. *Schmidt*, 340 F. Supp. 544, 550 (W.D. Wis. 1972).

This total control over all aspects of the lives of prisoners and other institutionalized persons can substantially interfere with their ability to practice their religious faiths. See Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("[i]nstitutional residents' rights to practice their faith is at the mercy of those running the institutions"). Examples of such interference abound.[5] The government fre-

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[5] See, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (Muslim prisoner prohibited from possessing prayer oil necessary for ritual cleansing before prayer); *Rich* v. *Woodford*, 210 F.3d 961, 962 (9th Cir. 2000) (dissent from denial of rehearing en banc) (officials refused to allow Native American death-row prisoner to participate in pre-execution sweat-lodge ceremony, which prisoner believed would "purify[] his body, mind, and soul" and "make amends for the people he harmed on Earth," thus "prepar[ing] him to cross over from this world to the next"); *Young* v. *Lane*, 922 F.2d 370, 375-376 (7th Cir. 1991) (upholding prison regulation that restricted wearing of yarmulkes); *Hunafa* v. *Murphy*, 907 F.2d 46, 48 (7th Cir. 1990) (noting instances where Jewish and Muslim prisoners are served pork and, as a result, go hungry); *Coronel* v. *Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (prison prevented Dianic-pagan prisoner from attending

quently requires incarcerated individuals to choose between acting in a manner contrary to their religious beliefs and suffering government-imposed penalties.[6]

3. Because the government-imposed burdens on religious rights that exist in prison and other state institutions lack any obvious parallel in the civilian world, it is useful to look to the ways that this Court and Congress have addressed religious liberties in analogous contexts, the most notable of which is the military.[7] It is well established that Congress has significant latitude to remove from members of the Armed Forces burdens on the exercise of religion—even if those burdens do not rise to the level of Free Exercise Clause violations.

For example, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), and Congress's response to it provide a ready exam-

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ceremonies of fellow pagan practitioners). See generally Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.").

[6] This dilemma is similar to those faced by the conscientious objectors in *Gillette*, who resisted the draft—risking criminal conviction—because they opposed war (see 401 U.S. at 445), and by a Jewish military officer in *Goldman* v. *Weinberger*, 475 U.S. 503, 505 (1986), who violated the Air Force's then-existing dress code by wearing a yarmulke and, as a result, received a formal letter of reprimand and faced a potential court martial. In both instances, this Court held or suggested that statutory exemptions from the general laws or rules at issue would be constitutional. See *Gillette*, 401 U.S. at 447; note 8, *infra*.

[7] Like prisoners and other institutionalized persons, the men and women in our Armed Forces lack the individual autonomy and freedom enjoyed by civilians. See *Goldman*, 475 U.S. at 507. Indeed, "the military is, by necessity, a specialized society separate from civilian society." *Id.* at 506 (quotation marks omitted).

ple of the "play in the joints" (*Locke*, 124 S. Ct. at 1311) between the Free Exercise and Establishment Clauses that exists in government-controlled environments. In *Goldman*, this Court held that the Free Exercise Clause did not *require* the Air Force to create an exception to generally applicable military-dress policies to allow a Jewish officer to wear a yarmulke. 475 U.S. at 513. But the Air Force's prohibition against non-military headgear was nevertheless a significant burden on Mr. Goldman's religious rights, and this Court's holding in *Goldman* did not suggest otherwise. Thus, after this Court decided *Goldman*, Congress enacted a statute requiring the military to remove the burden by generally allowing members of the Armed Forces to wear items of religious apparel. See 10 U.S.C. § 774; Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125 (1988). There has been no serious suggestion that the lifting of the burden violated the Establishment Clause.[8]

Similar considerations have been used to justify, in certain circumstances, government-funded chaplains in the military and in prisons. Courts have viewed such programs as the government lifting a burden of its own making from individuals under its control who have been "cut off by the State from all civilian opportunities for public communion." *Sch. Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); see, *e.g.*, *Katcoff* v. *Marsh*, 755 F.2d 223 (2d Cir. 1985). Accordingly, it has been posited that funding the chaplains "may be * * * sustained on constitutional grounds as necessary to secure the members of the

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[8] See *Texas Monthly*, 489 U.S. at 18 n.8 (plurality op.) ("if the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, that exemption presumably would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause") (citation omitted).

Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, * * * government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be." *Schempp*, 374 U.S. at 297-298 (Brennan, J., concurring). And hence, recognizing that the military must send its soldiers "to areas of the world where religion of their own denominations is not available to them," lower courts have upheld the constitutionality of chaplaincy programs insofar as they eliminate that special burden on service-members' practice of their religion. *Katcoff*, 755 F.2d at 234. Because the military has "uprooted the soldiers from their natural habitats[,] it owes them a duty to satisfy their Free Exercise rights." *Id.* at 228.[9]

Thus, a governmental action that removes a burden on religious exercise that would not exist *but for* the exceptional nature of these government-controlled communities could very well violate the Establishment Clause if recreated in the "outside" world. See *Schempp*, 374 U.S. at 297-298 (Brennan, J., concurring); *Developments in the Law—In the Belly*

[9] Specific chaplaincy programs may, however, violate the Establishment Clause by, for example, employing chaplains who proselytize or attempt to indoctrinate their subjects. *E.g.*, *Montano* v. *Hedgepeth*, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[h]aving made religious leaders available to inmates, however, a state cannot advance religion through indoctrination * * * or even encourage inmates' attendance at religious services") (citations and quotation marks omitted); *Katcoff*, 755 F.2d at 228 (noting that "[n]o chaplain is authorized to proselytize soldiers or their families"); cf. *Baz* v. *Walters*, 782 F.2d 701, 709 (7th Cir. 1986) (public veterans' hospital "must ensure" that its chaplains do not "proselytiz[e] upon a captive audience of patients"). Chaplaincy programs also present the risk of discrimination against minority religions and of inappropriate pressure being placed on soldiers by commanding officers.

of the Whale: Religious Practice in Prison, 115 HARV. L. REV. 1891, 1899 (2002) ("*Religious Practice in Prison*") ("Religious accommodations in prison * * * differ significantly from those of the outside world."). All that the government is doing in these instances is leveling the playing field by removing a burden of its own creation, rather than inappropriately encouraging religion.

4. Given this background, it is clear that Section 3 of RLUIPA avoids constitutional problems in that prisons and similar state institutions are the quintessential example of a setting in which substantial government-imposed burdens on religion give rise to a concomitant need for accommodations.

For starters, the statute is limited to state-run institutions such as prisons, mental hospitals, and juvenile-detention facilities. See 42 U.S.C. § 2000cc-1(a); 42 U.S.C. § 1997. These government-dominated worlds, like the military, lack parallel in the civilian community. Among other things, "[i]n prison, virtually *any* religious observance requires some governmental involvement—at the very least, a departure from otherwise applicable policies." *Religious Practice in Prison*, 115 HARV. L. REV. at 1892 (emphasis added). But prisoners and other institutionalized persons do not lose their constitutional right to the "free exercise [of religion]" (U.S. CONST. amend. I) in its entirety upon confinement. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."). Thus, the government *necessarily* should take action to allow religious exercise in these special environments.

Furthermore, even within these facilities the statute merely requires states to alleviate "burden[s]" on religious exercise (42 U.S.C. § 2000cc-1(a)), and does not permit—much less mandate—governmental encouragement of religion. As with Congress's legislative response to this Court's holding in *Goldman*, all Congress has mandated in this in-

stance is that states must grant to prisoners and other institutionalized persons religious freedoms closer to those that such persons would have were they not under governmental control. Because of the special nature and severity of the burdens on religious life in state prisons and similar institutions, the statute's requirement that states ameliorate these burdens should not be perceived by objective observers to be anything other than an appropriate accommodation of religion.

B. Section 3 Of RLUIPA Does Not Authorize Financial Aid To, Or Sponsorship Of, Religious Organizations.

Section 3 of RLUIPA was carefully crafted to avoid Establishment Clause problems in another way, as well: While states may be required to make minor expenditures to alleviate burdens on the religious exercise of prisoners and other institutionalized persons, nothing in the statute authorizes states to provide any form of direct financial assistance to religious organizations.

Direct money grants from the government to religious institutions pose a considerable threat to core Establishment Clause principles. *E.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 855-856 (2000) (O'Connor, J., concurring) ("direct money grants * * * fall[] precariously close to the original object of the Establishment Clause's prohibition"); *id.* at 890-891 (Souter, J., dissenting) ("from the start we have understood the Constitution to bar outright money grants of aid to religion"); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) ("we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions").

Section 3 of RLUIPA mandates no such aid, and none of the obvious examples of the sorts of accommodations that might be necessary because of the statute involve payments

to religious organizations. Rather, the following are typical of the sorts of accommodations that RLUIPA might compel:

- A prison or mental institution might be required to allow a prisoner or other institutionalized person to wear a yarmulke, cross, or veil; to grow a beard; or to keep prayer oil—despite otherwise-applicable rules precluding such items.
- A prison might be required to create a schedule for a prisoner who works in a prison job under which the prisoner is not required to work on a day of the week that the prisoner's religion designates to be a day of rest.
- A prison might be required to provide food to prisoners that complies with the dictates of those prisoners' religion, such as a no-pork or Halal diet for Muslims, Kosher food for Jews, a vegetarian diet for many Hindus, or a diet without meat on Fridays for certain Christians.
- A prison might be required to allow prisoners to gather once a week—assuming security concerns can be addressed adequately—to engage in religious services.
- A prison might be required to allow prisoners to meet periodically with clergy of their religious sect.

Critically, none of these forms of accommodation involves direct financial support to a religious organization—and most require no expenditure of any kind. In this way, RLUIPA is decidedly unlike programs that this Court has held to be unconstitutional, such as the direct money grants that New York once provided to religious schools for maintenance and repair expenses. See *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 779-780 (1973); see also *Rosenberger*, 515 U.S. at 842 (recognizing "special Establishment Clause dangers where the government makes

direct money payments to sectarian institutions"); cf. *Agostini*, 521 U.S. at 226-228 (upholding program allowing public-school teachers to provide instruction to eligible students on parochial-school premises in part because no funds reached religious schools' coffers).

Of course, even certain kinds of *indirect* support for religion that may be constitutional within prison walls would likely be unconstitutional if implemented outside the prison context. But worries about apparent state sponsorship of religion are mitigated in this case by the special nature of the institutions governed by Section 3 of RLUIPA.[10]

Finally, it is important to note that, in reality, the financial burden of RLUIPA falls largely on the prisoners and other institutionalized persons seeking accommodations, not on the state. For example, although Section 3 of RLUIPA generally has been interpreted to require prisons to allow prisoners to *possess* various religious texts and materials (see, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (overturning prison prohibition against possession of prayer oil)), those prisons cannot be compelled, and, indeed, may not *purchase* devotional items for the prisoners. See *Religious Practice in Prison*, 115 HARV. L. REV. at 1912 ("Ordering and funding personal ritual property is almost universally an inmate's responsibility * * *."). In fact, states sometimes even pass on to prisoners and other institutionalized persons administrative costs associated with religious

[10] Although prisoners or other institutionalized persons might ask for accommodations constituting direct aid, RLUIPA is not designed for that purpose, and the need to comply with the Establishment Clause—which is a compelling governmental interest—would preclude officials from providing it. See page 17, *infra*. Furthermore, most accommodations claimed under the statute almost certainly *would* be constitutional; those that may not be should be adjudicated in as-applied challenges in light of all relevant facts and circumstances.

accommodations. See, *e.g.*, Ohio Admin. Code § 5120-9-25(G) (2001) ("A new photo shall be taken whenever * * * any significant change in physical appearance has taken place. Rephotographing shall be at the inmate's expense if the change in appearance is occasioned by grooming changes"—which would include, for example, growing facial hair for religious purposes).

Thus, by not requiring—or even permitting—states to provide direct financial support to religious organizations, Section 3 of RLUIPA avoids running afoul of the Establishment Clause's prohibitions against such funding.

C. Section 3 Of RLUIPA Does Not Impose Substantial Burdens On Important Rights or Interests of Third Parties.

Section 3 of RLUIPA also avoids Establishment Clause problems because it does not authorize a state to accommodate the religious needs of prisoners and other institutionalized persons if, in so doing, the state would impose substantial burdens on significant rights or interests of third parties.

It is well established that an accommodation that substantially burdens third parties cannot withstand constitutional scrutiny. See, *e.g.*, *Texas Monthly*, 489 U.S. at 18 n.8 (plurality op.) (approving "legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs"); *Estate of Thornton*, 472 U.S. at 710-711; cf. *United States* v. *Lee*, 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").[11] A state has more latitude to accommodate religious

[11] For example, Connecticut's "Sabbath statute," which "provide[d] Sabbath observers with an absolute and unqualified right not to work on their Sabbath" (*Estate of Thornton*, 472 U.S. at

needs if an accommodation merely lifts substantial government-imposed burdens from some without also burdening others. And hence, a statute that mandates consideration of significant burdens placed on important rights or interests of third parties is substantially more likely to withstand constitutional scrutiny than one that ignores such burdens.

Applying this logic, Section 3 of RLUIPA is, on its face, a constitutionally permissible safeguard for the rights of prisoners and other institutionalized persons in that it does not authorize the states to impose substantial burdens on the important rights or interests of any identifiable group of non-beneficiaries.

1. The Statute Does Not Require Accommodations That Impose Substantial Burdens On Other Institutionalized Persons.

Although Section 3 of RLUIPA normally requires state officials to accommodate the needs of those prisoners and other institutionalized persons whose religious exercise calls for special accommodation, it does not impose substantial burdens on non-religious prisoners or other institutionalized persons, or on those prisoners or other institutionalized persons whose religious needs can be met without special accommodation. Allowing one person to engage in religious activity ordinarily will have no direct effect on anyone else. For example, other prisoners are usually not directly affected by special accommodations under which one prisoner is allowed to wear a cross, another is allowed to eat a special no-pork diet, and a third is allowed to attend weekly Mass.

710-711), violated the Establishment Clause by—in addition to not being designed to lift a government-imposed burden on religion—"plac[ing] an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987) (describing *Estate of Thornton*'s holding).

To be sure, certain requests for religious accommodations might impose a substantial burden on other prisoners or institutionalized persons. The statute, however, does not preclude state officials from taking into account potential effects on others when devising appropriate accommodations. See *Benning* v. *Georgia*, __ F.3d __, 2004 WL 2749172, at *12 (11th Cir. Dec. 2, 2004); Anne Y. Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls*, 79 WASH. L. REV. 999, 1022-1023 (2004). Under RLUIPA, the state may deny an accommodation if the denial would "further[] a compelling governmental interest" by "the least restrictive means." 42 U.S.C. § 2000cc-1(a). Avoiding substantial burdens on the important rights or interests of other prisoners—because of Establishment Clause concerns or otherwise—may qualify as a compelling governmental interest. See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."). In such circumstances, RLUIPA does not require an accommodation.[12]

2. The Statute Does Not Require Accommodations That Would Significantly Interfere With The Functioning Of An Institution.

Any concern that religious accommodations under Section 3 of RLUIPA could significantly disrupt the functioning

[12] Because Section 3 of RLUIPA does not automatically require accommodation, any claim that the statute is unconstitutional because it imposes excessive burdens on the important rights and interests of third parties can and should be addressed on an as-applied basis. See note 10, *supra*.

of state institutions is also adequately addressed by the statute.

RLUIPA mandates a balancing test under which states may deny a proposed accommodation of religion if necessary to further a compelling governmental interest. See 42 U.S.C. § 2000cc-1(a). For example, some "institutions have struggled with the issue of political and ideological groups, including hate groups, masquerading as religious organizations." See *Religious Practice in Prison*, 115 HARV. L. REV. at 1903. RLUIPA, however, does not render prison officials powerless against such threats. If a particular prisoner's religious practice would require an accommodation that would threaten security or otherwise significantly disrupt order in an institution, RLUIPA permits authorities to refuse that accommodation. In fact, the sponsors of RLUIPA specifically expressed their belief that courts would "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of cost and limited resources." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775.

In any event, the evidence to date suggests that Section 3 of RLUIPA will not excessively disrupt the functioning of state prisons or other institutions. The Federal Bureau of Prisons has long been subject to provisions in the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4, that mirror those in Section 3 of RLUIPA. See 42 U.S.C. § 2000bb-1(a)-(b). Similarly, many states have enacted their own versions of RFRA, which require religious accommodations in state institutions. See Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 44-45 & nn. 81-84 (2000) (detailing state efforts). These statutes have not undermined the institutions' ability to maintain order and safety because—like RLUIPA—they allow the institutions to establish reasonable policies to counter potential abuse or threats to institutional order. Indeed, "[i]n the cases litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time[, which] * * * suggests that RLUIPA should not hamstring the ability of [state] correctional officials to ensure order and safety in the[ir] prisons." *Madison* v. *Riter*, 355 F.3d 310, 321 (4th Cir. 2003). Accord *Benning*, 2004 WL 2749172, at *12 ("only a small percentage of prisoners' claims [under RFRA] were successful").

* * * * *

Thus, Section 3 of RLUIPA does not require states to impose substantial burdens on important rights or interests of non-beneficiaries of religious accommodations, a fact that further insulates the statute from facial constitutional challenge under the Establishment Clause.

D. Section 3 Of RLUIPA Does Not Create Incentives For Prisoners And Other Institutionalized Persons To Modify Their Religious Beliefs or Practices.

Finally, Section 3 of RLUIPA avoids constitutional infirmity by not giving prisoners and other institutionalized persons incentives to become religious or to change their religious beliefs or practices.

1. It is axiomatic that a statute or governmental program cannot "give aid recipients any incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination." *Agostini*, 521 U.S. at 231-232; accord *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 650 (2002); *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993). Section 3 of RLUIPA, on its face, does not create any such illegitimate incentives.

The statute does not on its face encourage prisoners or other institutionalized persons to be religious. Cf. *Agostini*,

521 U.S. at 231-232. Rather, it requires states to remove state-imposed "burdens" on religion, but does not permit states to encourage or give special benefits to religious exercise. See 42 U.S.C. § 2000cc-1(a).

Nor does Section 3 of RLUIPA in any way discriminate *among* religions. See *Kiryas Joel*, 512 U.S. at 706-707 ("whatever the limits of permissible legislative accommodations may be * * * it is clear that neutrality as among religions must be honored"). Under RLUIPA, an adherent of any religion—which necessarily includes both mainstream and obscure religions, as well as any other deeply held belief system (see note 3, *supra*)—is entitled to request an accommodation of that person's religious exercise, and the state must thereafter evaluate the request on neutral grounds. The fact that, in order to practice their respective religious faiths, adherents of different religions may need different accommodations does not suggest governmental bias towards any specific religion. Cf. *Kiryas Joel*, 512 U.S. at 714-715 (O'Connor, J., concurring) ("Accommodations may * * * justify treating those who share [a deeply held] belief differently from those who do not, but they do not justify discrimination based on sect.").

2. Of course, even a statute that does not on its face encourage religion and that is facially neutral among religious sects may still in practice provide an unconstitutional incentive to change one's religious beliefs. And given the realities of prisons—and, in particular, prisoners' understandable desire for anything that breaks the monotony of institutional life—there might well be occasions on which a prisoner's motive for requesting a religious accommodation is insincere. But whether any particular "accommodation" might in fact cross the line and constitute an unconstitutional fostering of religion by encouraging prisoners and other institutionalized persons to be—or pretend to be—religious is merely an implementation issue appropriately left for as-applied challenges to the statute. As a facial matter, the statute simply removes burdens hindering religious exercise; it does not encourage such exercise.

Furthermore, there is no reason to believe that, even as applied, Section 3 of RLUIPA will unlawfully encourage religiosity or the practice of specific religions. Nothing in the statute prevents states from inquiring into the *sincerity* of the religious beliefs of a prisoner or other institutionalized person. See *Religious Practice in Prison*, 115 HARV. L. REV. at 1901-1909 (discussing state and federal policies designed to detect and deter insincere requests by prisoners for religious accommodations). Although RLUIPA bars inquiries into whether a particular belief or practice is "central" to a prisoner's religion (see 42 U.S.C. § 2000cc-5(7)(A); see also *Employment Div.* v. *Smith*, 494 U.S. 872, 886-887 (1990) (recognizing inappropriateness of judges assessing the centrality of a practice to an individual's religious beliefs)), the statute does not preclude inquiries into the *genuineness* of a prisoner's avowed religiosity—an inquiry that the courts routinely undertake in a range of Religion Clause cases.[13] Therefore, there is no reason to presume that, in practice, Section 3 of RLUIPA is likely to encourage religious changes of heart.

* * * * *

Thus, the fact that Section 3 of RLUIPA does not on its face provide an incentive for prisoners and other institutionalized persons to change their religious convictions is another

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[13] See, *e.g.*, *Gillette*, 401 U.S. at 457 ("[T]he truth of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held.") (quotation marks omitted); *United States* v. *Seeger*, 380 U.S. 163, 165-166 (1965) ("[T]he test of belief 'in a relation to a Supreme Being' is whether a given belief that is *sincere* and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God * * *.") (emphasis added).

consideration that saves the statute from infirmity under the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that Section 3 of RLUIPA is facially constitutional.

Respectfully submitted.

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